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Supreme Court of the United States

October Term, 1958

No. 662

CALIFORNIA TANKER COMPANY,

Petitioner,

against

ALBERT REARDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1958

No.

CALIFORNIA TANKER COMPANY, *Petitioner,*

against

ALBERT REARDON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

California Tanker Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on November 6, 1958.

Opinions Below

None of the opinions of the courts below or of the judges thereof have been reported.

The oral opinion of the United States District Court for the Southern District of New York (Herlands, J.), delivered February 14, 1957, appears at 18a-24a.*

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* Citations to pages of the Appendix to the defendant's brief in the Court of Appeals are to numbers suffixed with the letter "a".

The various opinions of the Court of Appeals and the judges thereof appear as follows:

	Appendix *
Original opinion by Judge Swan, concurred in by Judge Waterman, dated April 7, 1958	pp. 1–6
Dissenting opinion of Judge Medina, dated April 7, 1958	pp. 6–10
Per curiam opinion of Court in banc, dated November 6, 1958	pp. 11–13
Concurring opinion of Judge Waterman, dated November 6, 1958	pp. 13–15

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1958 (Appendix, p. 11). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

In a suit for a personal injury brought under the Jones Act, may the defendant introduce in evidence as a set off and in mitigation of damages, proof of indemnity paid to the plaintiff by way of maintenance and cure for the same injury?

Statutes Involved

46 U. S. C. § 688 (Act of June 5, 1920, § 33 [Jones Act]):

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election,

* The references to pages of the "Appendix" are to the appendix to this petition.

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * *"

45 U. S. C. § 55 (Act of April 22, 1908, § 5 [Federal Employers Liability Act]):

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Statement

Respondent brought suit under the Jones Act in the United States District Court, Southern District of New York, for $10,000 damages against petitioner, his employer, for an injury alleged to have been caused by petitioner's negligence (2a). The complaint made no demand for maintenance and cure. Petitioner answered, denying negligence (4a-5a).

At the trial petitioner sought to introduce evidence that, in respect of the same injury, it had paid respondent maintenance and cure amounting to $576 covering the period of respondent's disability, viz., 72 days, at the rate of $8 per day, that being the rate fixed by collective bargaining agreement (7a-9a).

The actual language of the agreement, paraphrased at 14a, is as follows:

> "Section 59. Maintenance and Cure Benefits. (a) Crew members who are entitled to maintenance under the general maritime law-doctrine of wages and maintenance and cure on account of injury or illness incurred in the service of the ship shall be paid maintenance at the rate of eight dollars ($8.00) per day, with payments to be made once weekly."

The agreement in no respect purported to liquidate any tort liability or any element of tort liability.

The District Judge (Herlands, J.) excluded this evidence, instructed petitioner's counsel to ask no questions on the subject and not to mention it in the presence of the jury (9a).

In charging the jury the District Judge said (11a):

> "* * * [Y]ou may not take into consideration the cost of his room and board during his period of convalescence. These items have been disposed of and adjusted by the parties and are not in the case for your consideration."

The jury returned a verdict for respondent for $1,600 (12a). Judgment for respondent in the amount of the jury's verdict was entered on January 21, 1957 (25a).

Petitioner took an appeal to the United States Court of Appeals for the Second Circuit (1a). On April 7, 1958 the Court of Appeals reversed the judgment of the District Court (Appendix, p. 1). The opinion of the Court was written by Judge Swan (Appendix, pp. 1-6) and concurred in by Judge Waterman. Judge Medina dissented in an opinion (Appendix, pp. 6-10).

Essentially Judge Swan said that when respondent sought lost earnings for a given period petitioner was entitled to show in mitigation of damages whatever it had paid respondent for that period.

Judge Medina's opinion is aptly summed in the subsequent per curiam opinion of the Court (Appendix, p. 12):

> "• • • [T]he amount of $8 per day for this item fixed in the collective bargaining agreement was a fair and proper pre-estimate which neither party could repudiate."

Thereafter respondent filed a petition for rehearing addressed under 28 U. S. C. § 46(c) to the Court in banc. This petition was filed on respondent's behalf not only by the counsel who had previously represented him in this action but also by several other attorneys prominent in New York maritime personal injury litigation for plaintiffs. The petition for rehearing did not urge Judge Medina's views. The Court directed present petitioner to answer in writing but did not order a rehearing.

On November 6, 1958 the Court of Appeals vacated its own prior decision and affirmed the judgment of the District Court.* A *per curiam* opinion adopted the views expressed by Judge Medina in his dissenting opinion. The *per curiam* opinion explicitly rejected the arguments on which the rehearing had been sought. Judge Moore concurred in the result only (Appendix, p. 13). Judge Waterman wrote an opinion concurring in the result but expressing certain reservations (Appendix, pp. 13-15).

Effect of the Decision

The decision of the Court of Appeals: (1) denies petitioner a set off expressly provided by statute and recognized by decisions of law; (2) treats a contract made to fix

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* 28 U. S. C. § 46(c) appears to contemplate that the court in banc will reverse the decision of a panel only after a hearing or rehearing. In this case, of the five judges who participated in the decision of the Court in banc, only one had heard oral argument at any time, viz., Judge Waterman, who concurred in the decision of the Court in banc with obvious reluctance. Presentation of the case for petitioner has also been hampered by the fact that respondent's numerous and experienced counsel at no time urged the theory adopted by Judge Medina and later by the Court in banc.

compensation as a liquidation of tort liability, a result not intended by the parties and forbidden by statute and decisional law; and (3) submits the case to the jury on incomplete facts, petitioner submits.

Reasons for Granting the Writ

1. The case presents an important question of federal law which has not been but should be settled by this Court.

Jones Act litigation comprises a substantial proportion of the work of the federal courts, 72% of all private litigation in the United States District Court for the Southern District of New York.* Ordinarily a seaman suing under the Jones Act also has a remedy in maintenance and cure. The proper correlation of these remedies is therefore a question in almost all this enormous litigation.

2. The Court of Appeals decision is in the teeth of Section 5 of FELA, providing that any indemnity paid by the employer to the injured employee shall be a set off against his damages. The theory on which the Court refused to allow the set off, viz., that the $8 a day maintenance rate was a valid advance agreement liquidating items of Jones Act damages, was error, petitioner submits.

The second part of Section 5 explicitly provides that any indemnity paid to an injured employee pursuant to a compensation contract shall be a set off against his damages. The Court of Appeals nevertheless refused to allow the set off on the ground that the $8 a day maintenance rate was "a fair and proper pre-estimate which neither party could repudiate." (Appendix, p. 12).

Petitioner submits that this view of the contract is false, contrary to the intentions of the parties, to the first part of Section 5 forbidding the limitation of FELA damages, and to the general legal doctrine that damages for negligence can not be liquidated in advance by contract.

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* In fiscal 1958; 34% for all District Courts in the federal system. Table C-3, Report of Director of Administrative Office of United States Courts for 1958.

And there was no question of repudiation. The agreement did not purport to liquidate some portion of petitioner's liability to respondent for injuries suffered from negligence. The $8 a day was agreed upon as compensation for respondent in respect of petitioner's maintenance obligations to him. Respondent was paid the agreed maintenance and was fully satisfied with the payment. He had no complaint on the score of maintenance.

The purpose of Section 5 is shown by its legislative history (esp. Sen. R. 3639, 59th Cong., 1st Sess.) and the opinion of this Court in *Philadelphia, B. & W. R.R. Co.* v. *Schubert*, 224 U. S. 603.

At the time of its enactment many railroads operated so-called "relief departments". These railroads contracted to pay injured employees specified amounts of money, irrespective of fault, but required an advance release of tort liability from the employee. The railroads contributed all or part of the relief department funds, the balance being assessed against the employees. The purpose of Section 5 was to invalidate these agreements to the extent, and only to the extent, that they liquidated an injured employee's damages, but to authorize the railroad to set off the tort liability created by FELA the indemnity paid to the employee or for his account.

In short, Congress intended to permit these contractual schemes to continue but to give them effect in FELA actions for set off purposes only. Cf. 224 U. S. 612-613.

Of the decisions of this Court, perhaps *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452, best shows the practical operation of Section 5. The defendant was permitted to introduce evidence of the benefits received by plaintiff from the relief department of plaintiff's employer, the Chicago, Burlington & Quincy Railroad Company, which contributed fifteen per cent of the costs of the department. Like maintenance, the benefits consisted of a stipulated sum

per day of disability, plus medical expense. The Illinois courts, from which the case came, held that defendant was entitled to a set off of fifteen per cent of the benefits. 150 Ill. App. 196, esp. 207-208; 265 Ill. 245. This Court affirmed their judgment.

The ruling of the Court of Appeals that "neither party could repudiate" in an FELA action a compensation contract in so far as it might affect an item of plaintiff's claim for damages for negligence is thus in sharp conflict with the first part of Section 5 providing that any contract which exempts a carrier "from any liability created by this chapter shall to that extent be void".

The arbitrary liquidation by advance agreement of damages for negligence is not only contrary to the first part of Section 5 but is unknown to tort law with limited exceptions irrelevant here: *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85; *United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236. And, "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption." *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 650.

Thus, on an hypothesis which violated the facts, the first part of Section 5 and decisional law, viz., that the agreement was an intentional and valid liquidation of damages for negligence, the Court below has denied petitioner the right expressly granted it by the second part of Section 5, viz., the right to set off the indemnity payments made under the maintenance agreement.

Even if we are mistaken in our challenge to the Court's treatment of the maintenance agreement as a liquidation of petitioner's tort liability, the exclusion of the set off deprived petitioner of its rights not only under the second part of Section 5 but also under decisional law, as we shall show.

3. The decision below conflicts with the well-settled doctrine of tort law approved by this Court that moneys paid the plaintiff by his employer in connection with the tort sued on may be shown in mitigation of damages, as recently held by the Court of Appeals for the Fourth Circuit in *United States* v. *Brooks*, 176 F. 2d 482 (C. A. 4th).

In *United States* v. *Brooks* the Court considered a claim by a United States soldier under the Federal Tort Claims Act for an injury suffered because he had been negligently struck by an Army truck. As a soldier plaintiff had been entitled to and had received certain hospital expenses and disability benefits, comparable to maintenance and cure. The right to these expenses and benefits payable to plaintiff was provided by statute, 38 U. S. C. § 301, and the amount was presumably fixed by regulations having the force of law, although the opinion is silent on this point.

In reaching this conclusion the Court said at p. 484:

> "In tort actions by employees against their employers, it is well settled that wages and other payments made by the employer to the employee are properly deductible in mitigation of damages."

The Court cited a number of texts and court decisions, including *Southwestern Brewery Co.* v. *Schmidt*, 226 U. S. 162.

4. The ruling of the Court of Appeals is contrary to texts and court decisions on the precise question, and to other court decisions on the avoidance of double liability in this situation.

The precise question has been ruled and commented on several times, always favorably to petitioner.

In *Guay* v. *American President Lines, Ltd.*, 81 Cal. App. (2d) 495, 1949 A. M. C. 1890, the California District Court of Appeal for the First District took the same view as Judge

Swan and Judge Waterman in the original opinion, saying at 1949 A. M. C. 1903:

> "* * * He [plaintiff] offered evidence that his earning power was so much before the accident, and totally cut off during that period. The defendant should have been permitted to show that in fact plaintiff 'earned' through 'maintenance" paid to him the sum of $539. * * *"

In *Royle* v. *Standard Fruit & Steamship Co.*, 184 Misc. 348 (Sup. Ct., Kings Cty.), affirmed 269 App. Div. 762 (2d Dept.), the New York Courts held, in a Jones Act case, that an affirmative partial defense of maintenance and cure payments was properly pleaded, relying primarily on Section 5 of FELA.

In *Jenkins* v. *Roderick*, 156 F. Supp. 299 (D. Mass.), the Court, discussing the proper charge to be delivered in a case in which both maintenance and Jones Act damages were claimed, said at p. 306 that the trial judge should

> "caution them [the jury] to take into account in any Jones Act or unseaworthiness recovery premised on diminution of earning capacity the amount they, the jury, have allowed for maintenance".

Professor George K. Gardner of the Harvard Law School said in his article, *Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen*, 71 Harv. L. Rev. 438, at p. 453:

> "* * * Inasmuch as the Jones Act incorporates the Federal Employers' Liability Act by reference, it seems clear that section 55* of the latter act entitles the seaman's employer to credit any sums paid to the seaman by way of maintenance and cure against any tort liability to which he may be subject for the same injury."

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* Referring to 45 U. S. C. § 55 which is Section 5 of FELA.

The treatise, *Law of Admiralty*, 261, by Professors Grant Gilmore and Charles E. Black of the Yale Law School is to the same effect.

In several instances the courts have had occasion to deal with claims for maintenance made after adjudication or settlement of tort claims asserted in connection with the same injury. The courts have invariably accepted proof offered by the defendant by way of set off. *Smith* v. *Lykes Bros.*, 105 F. 2d 604 (C. A. 5th); *Muise* v. *Abbott*, 160 F. 2d 590 (C. A. 1st); *Gomes* v. *Eastern Gas Associates*, 132 F. Supp. 29 (D. Mass.).

> 5. The decision below rejected petitioner's evidence on the ground that it related to items of damage liquidated by advance agreement and by payment. The principle of this decision will expose shipowners to excessive damages in Jones Act cases both because the maintenance contract rate may exceed the room board and medical expense and because it denies the shipowner the right to show the jury how it has indemnified the injured employee, a right granted by the common law of evidence and confirmed by Section 5 of FELA and not adequately enforced by the Judge's charge.

We know of no precedent for a basic theory underlying the decision below, viz., that when an employer, or any tort defendant, has, by advance agreement or otherwise, indemnified certain items of damage, proof of those items by plaintiff, and of the payment thereof by defendant, becomes inadmissible, and the jury is charged that those items have been "disposed of."

It is particularly inappropriate to evolve this theory in a case governed by the Federal Employers Liability Act. When Congress came to enact FELA, it might, we suppose, knowing of the existence of indemnity contracts, have provided that when an employer indemnified items of damage, proof of the damage and of the indemnity became inadmissible. But Congress did not so provide. Congress pro-

vided by Section 5 that an employer who indemnified an employee would derive no immunity from the indemnity, but would have a set off—and a set off has the status of an independent claim. *Talcott v. United States National Bank*, 174 U. S. 125, 148. That provision necessarily assumed that, conversely, the plaintiff could show all items of damage, whether or not any of them had been indemnified, and that the defendant could prove the set off. The Court below has, we submit, gone about the protection of the parties in this kind of situation in exactly the opposite way from that provided by Congress.

In this particular instance the theory is unfair to a defendant shipowner for a variety of reasons. First, the agreement did not relate to tort liability. Second, the result may be, even assuming that the jury correctly understands and applies the judge's charge, to pay excessive damages, a result which will necessarily occur whenever the maintenance contract rate exceeds the room, board and medical expense. Cf. *Johnson v. United States*, 333 U. S. 46.

Equally serious, however, is the denial of the defendant's right to show and argue to the jury what it has paid the plaintiff respecting the various kinds of damage that he has, or obviously may have, suffered.

Here proof of the indemnity was relevant for two reasons. The jury, knowing that respondent was provided with room and board while employed, would take these matters into account irrespective of specific proof. Further, Section 5 of FELA gave petitioner an affirmative set off.

A judge may not, of course, charge the jury on facts of the case not in evidence. *Insurance Co. v. Baring*, 87 U. S. 159, 161; *Succession v. Erving*, 228 U. S. 233, 242; *Crane v. Delaware, L. & W. R. Co.*, 1 F. 2d 865, 866 (C. A. 3d).

In charging the jury that these items had been "disposed of and adjusted by the parties" the Judge recognized

the relevance of the indemnity but by forbidding the introduction of evidence or comment by counsel on that subject, he deprived the jury of those opportunities to comprehend and relate the facts of the agreement which the law of evidence and trial procedures contemplate.

CONCLUSION

The Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted,

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Appendix

Opinion on Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 53—October Term, 1957.

(Argued November 8, 1957 Decided April 7, 1958.)

Docket No. 24583

ALBERT REARDON,

Plaintiff-Appellee,

v.

CALIFORNIA TANKER COMPANY,

Defendant-Appellant.

Before:

SWAN, MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, William B. Herlands, *Judge.*

MACLAY, MORGAN & WILLIAMS, Attorneys for Appellant, C. Dickerman Williams and Robert M. Makla, of Counsel.

HARRY RUDERMAN, Attorney for Appellee, John Gleason, of Counsel.

SWAN, *Circuit Judge*:

This is an appeal by defendant from a judgment for plaintiff after trial to a jury in an action brought under

the Jones Act, 46 U. S. C. A. § 688, to recover damages for personal injuries sustained by plaintiff while employed as a seaman on defendant's vessel. The question presented by the appeal is whether the court erred in excluding evidence that defendant had paid plaintiff, pursuant to a collective bargaining agreement with the seamen's union, for maintenance and cure.

Plaintiff's suit claimed damages of $10,000 for an injury alleged to have been caused by defendant's negligence. The complaint made no demand for maintenance and cure, and defendant's answer made no reference to that subject.[1] The facts established at the trial are simple and undisputed. As a result of his injury, plaintiff was incapacitated for work from August 30, 1955, when he signed off the vessel at the end of the voyage, to November 10, 1955, when he was pronounced fit for duty. He incurred no expenses for medical treatment, and his loss of earnings during the 72 day period of his convalescence could not exceed $831, computed on the basis of his wages at the time of the accident.

During the trial, but not in the presence of the jury, defendant's counsel offered to prove that defendant had paid plaintiff for maintenance and cure for the 72 day period at the rate of $8 per day pursuant to its collective bargaining agreement with the union, a total of $576. The court ruled the evidence to be inadmissible and directed defense counsel to ask no questions on the subject.

In his charge the judge instructed the jury that, if they found the plaintiff entitled to a recovery, only two items of damage were to be considered, namely, loss of wages, which could not exceed $831, and compensation for pain and suffering resulting from the injury. He further charged that "no other element may be used in computing the damages which you may award plaintiff. For example, you may not take into consideration the cost of his room and board during his period of convalescence. These items have been

[1] The answer denied negligence and alleged as affirmative defenses assumption of risk and contributory negligence.

disposed of and adjusted by the parties and are not in the case for your consideration." The jury returned a general verdict of $1,600, and judgment was entered thereon.[2]

A seaman who falls sick or is injured while in the service of the ship is entitled to receive from the ship, or its owner, maintenance and cure, and wages to the end of the voyage.[3] Maintenance means keep, that is food and lodging. "The maintenance exacted is comparable to that to which the seaman is entitled while at sea [citations omitted] and 'cure' is care, including nursing and medical attention during such period as the duty continues."[4] The rights to maintenance and cure exist not only during the voyage but continue after the voyage ends until the disabled seaman has been so far cured as possible.[5] During such period he is entitled to reimbursement of expenses incurred for maintenance and cure; but if he incurs no expenses for food and lodging he can recover nothing for "maintenance" and if he has no medical expenses he has no claim for "cure".[6] These rights, together with the right to receive wages dur-

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[2] Thereafter defendant moved under Rule 15(b) F. R. C. P. to amend its answer to allege as an affirmative defense and in diminution of damages the facts which it had offered to prove as to payment of maintenance and cure. This motion was denied chiefly on the ground that it was unnecessary, since the record as made adequately protected defendant's right to raise on appeal the court's ruling as to the excluded evidence. We agree that it does.

In denying the motion Judge Herlands delivered an unreported opinion which gives not only his reasons for denying the motion but also his reasons for excluding the evidence.

[3] "For ocean going ships, the rule is said to be that wages are recoverable for the balance of the voyage * * *. In coastwise shipping it is customary to sign on crew members not for a voyage but for a period of time, and recovery of wages until the end of term is regularly granted." See *Gilmore and Black*, The Law of Admiralty 268, and cases there cited.

[4] The quotation is from the opinion of Mr. Justice Stone in *Calmar S.S. Co. v. Taylor*, 303 U. S. 525, at 528.

[5] *Farrell v. United States*, 336 U. S. 511, at 517-519.

[6] *Johnson v. United States*, 333 U. S. 46, 50. *Slankiewicz v. United Fruit S.S. Corp.*, 2 Cir., 229 F. 2d 580, 581; *Field v. Waterman S.S. Corp.*, 5 Cir., 104 F. 2d 849, 851.

ing the period for which he was employed, arise from the employment contract, and are separate from, and independent of, any right the seaman may have based on the fact that his injury resulted from negligence chargeable to his employer, or from unseaworthiness of the vessel. By the Jones Act a seaman injured by negligence chargeable to his employer was given an independent right against the employer.[7]

Although the injured seaman may have cumulative claims, one based on contract, the other on tortious conduct, it is obvious that he should be compensated but once for the loss which he has sustained. This principle has usually been discussed in suits for maintenance and cure brought after the seaman had already had recovery in a suit brought under the Jones Act.[8] In *Muise* v. *Abbott*, 1 Cir., 160 F. 2d 590, where the seaman appealed from a judgment allowing him only partial relief in a libel for maintenance and cure, the court said at page 592 that "the damages in each action to some extent overlap, and the rule prevails in admiralty as elsewhere in the law that no one may recover compensatory damages more than once." In *Robinson* v. *Isbrandtsen Co.*, 2 Cir., 203 F. 2d 514, 516, we vacated a judgment for the plaintiff on the third count, which was for maintenance and cure, because the judgment on the first count, based on the Jones Act, "presumably covered lost wages, since there was testimony on this subject which the jury was told to consider."

In the case at bar the problem presented is whether exclusion of the proffered evidence may have permitted the plaintiff to recover damages in excess of those actually sustained.[9] If so, the evidence was relevant and should have been admitted.

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[7] *Pacific S.S. Co.* v. *Peterson*, 278 U.S. 130, 138.

[8] See *Smith* v. *Lykes Brothers Ripley S.S. Co.*, 5 Cir., 105 F. 2d 604, certiorari denied 308 U.S. 604; *Muise* v. *Abbott*, 1 Cir., 160 F. 2d 590; *McCarthy* v. *American Eastern Corp.*, 3 Cir., 175 F. 2d 727; *Robinson* v. *Isbrandtsen Co.*, 2 Cir., 203 F. 514; *Gomez* v. *Eastern Gas Associates* (D. C. Mass.), 132 F. Supp. 30, 31.

In *Perez* v. *Sawance S.S. Co.*, 2 Cir., 239 F. 2d 180, it was held to be error to refuse to deduct from the award for maintenance wages earned by the seaman as a dishwasher during the period of his alleged incapacity. The opinion states, page 181:

> "The remedy of maintenance is to put the seaman in as good a position as to board and lodging as he would have been in, if he had not become ill. If what he earned is added to the full allowance, he will get something more in addition to his maintenance."

In the present case the jury's verdict awarded plaintiff $1600.[9] Under the court's instructions that the jury might allow not more than $831 for lost earnings, it may be "presumed" that something was allowed for this item of damages.[10] Hence this is the converse of the Perez situation. There the shipowner was held entitled to reduce the allowance for maintenance by the excess of the amount paid for maintenance over the amount actually expended for this item of damages. Here the shipowner claims to be entitled to reduce the jury's award for lost earnings. There is no proof whether plaintiff incurred any expense for food and lodging during his period of convalescence after the voyage ended. If the jury awarded the plaintiff $831 for lost wages, and plaintiff actually paid out less than $576 for his food and lodging, the plaintiff has been awarded "double compensation" to the extent of the excess. If the jury awarded less than $831 for lost wages, but their award for this item, plus the $576, exceeded plaintiff's actual expenses for maintenance and the amount of his lost wages, he has still been overpaid. By directing defendant's counsel to ask no questions on the subject of maintenance the court precluded defendant from proving any overpayment.

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[9] Since the jury returned a general verdict, it may well be doubted whether the judgment could be reversed, if the trial were conducted without error. However, the question before us is whether the evidence was rightly excluded.

[10] *Robinson* v. *Isbrandtsen Co.*, 2 Cir., 203 F. 2d 514, 516.

It seems strange that the precise point has apparently been litigated only once. We have found no case precisely in point other than that cited by counsel for appellant, namely, *Guay* v. *American President Lines, Ltd.*, 81 Cal. App. 2d 495, 184 P. 2d 539, also reported [illegible]49 A. M. C. 1890.[11] There, as here, in an action under the Jones Act, evidence offered to prove payment of maintenance was excluded. The court held: "The defendant should have been permitted to show that in fact plaintiff 'earned' through 'maintenance' paid to him the sum of $539 * * *." We agree with that decision, and think that error was committed in the case at bar in excluding the proffered evidence and directing counsel to ask no questions on the subject.

Accordingly the judgment is reversed and the cause remanded for a new trial to be conducted in conformity with this opinion.

MEDINA, *Circuit Judge* (dissenting):

I dissent because, in my opinion, any evidence of the maintenance and cure payments made by the appellant pursuant to the terms of the collective bargaining agreement was totally immaterial to the question of the amount of damages recoverable by the appellee in the case at bar.

In this suit, brought under the Jones Act, 46 U. S. C. § 688, the appellee claimed that he was injured while a seaman in the employ of the appellant, and that such injury resulted solely from the appellant's negligence or the unseaworthiness of the vessel. Appellee sought to recover for loss of wages from August 30, 1955, the date of his signing off the appellant's ship, through November 10, 1955, when he was certified fit for duty, and for pain and suffering due to the injury. In the course of the trial the appellant sought to introduce evidence, in order to reduce the amount of the appellee's possible recovery, to

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[11] Somewhat analogous, but not involving maintenance, is *United States* v. *Brooks*, 4 Cir., 176 F. 2d 482, upon which appellant also relies.

show that the company paid the appellee maintenance and cure at the rate of $8 a day, a total of $576, pursuant to a collective bargaining agreement with the appellee's union which established that rate. The trial court ruled that the evidence was inadmissible as likely to confuse and prejudice the jury, but instructed the jury that in considering the amount of the appellee's damages they were "not (to) take into consideration the cost of his room and board during his period of convalescence." On the basis of the appellee's earnings prior to the date of his injury, the court also charged the jury that they could award the appellee as much as, but no more than, $831 for his lost wages. The jury returned a general verdict awarding the appellee $1,600.

The appellant, in appealing from the trial court's refusal to admit evidence regarding the maintenance and cure payments, bases its claim on two contentions. First, it argues that, since an injured seaman suing in tort for compensatory damages cannot secure a double recovery for his lost wages, the maintenance and cure payments are admissible in mitigation of damages. The appellant's second contention is that Section 5 of the Federal Employer's Liability Act, 45 U. S. C. § 55, which provides "(t)hat in any action brought against any * * * common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought" and which is applicable to the case at bar by virtue of 46 U. S. C. § 688, permits that the amount paid for maintenance and cure be set off against the tort claim of the injured seaman. Although this latter point is not mentioned in the majority opinion in reversing the decision of the court below, it is necessary to consider both of the appellant's contentions in order to affirm the result in the trial court. Each of these arguments is, in my opinion, without merit.

Without needlessly repeating the review of the law with regard to the rights of an injured seaman which is amply set forth in the majority opinion, there are certain distinctions between the seaman's rights under general maritime law and his rights under the Jones Act which must be borne in mind. Under general maritime law a seaman who becomes ill or is injured during the course of his employment is entitled to maintenance and cure at the expense of the shipowner. These rights are part of the consideration for the seaman's agreement to work on the ship, and thus are not predicated on a claim that the illness or injury was due to negligence or the unseaworthiness of the vessel. Under the Jones Act an injured seaman may assert a claim against the shipowner on the ground that the latter was negligent and join therewith a claim based on the unseaworthiness of the vessel. This tort claim is in addition to, and independent of, the seaman's right to maintenance and cure. *Pacific S.S. Co.* v. *Peterson*, 278 U. S. 130.

It is in the application of these principles to the case at bar that I disagree with the views of my brothers. The majority opinion apparenty completely disregards the fact that the maintenance and cure payments made to the appellee were made pursuant to the provisions of a collective bargaining agreement with the appellee's union. Thus, while it is undoubtedly sound law that, absent such an agreement, a seaman who spends no money for his lodging and medical care as the result of an injury cannot recover any sum from the shipowner for maintenance and cure, *Johnson* v. *United States*, 333 U. S. 46, 50; *Stankiewicz* v. *United Fruit S.S. Corp.*, 2 Cir., 229 F. 2d 580, 581; *Field* v. *Waterman S.S. Corp.*, 5 Cir., 104 F. 2d 849, 851, unless the provision in the collective bargaining agreement which fixed a rate for maintenance and cure payments is void, this rule of law has no bearing on the case at bar. There is no intimation in the majority opinion that the maintenance and cure provision is invalid, and indeed there would seem to be no sound reason for such a holding.

Since the appellee was entitled, under the union contract, to the maintenance and cure payments, I turn to another possible ground for reversal. The appellant contends that those payments, plus the amount awarded the appellee by the jury, constituted a "double recovery." In my opinion, however, they did not amount to excessive compensation because the verdict did not include recovery for board and lodging and there was no claim submitted by the appellee for medical expenses. If the appellee actually spent more than $576 for expenses within the category of maintenance and cure, he would have no claim against the ship owner for this excess because of the rate fixed by the contract. Likewise, if he spent less than this amount the shipowner cannot be heard to claim a "rebate" after having agreed to the rate in the contract. The right to maintenance and cure payments was separate and distinct from the appellee's claim for lost wages and pain and suffering due to the injury, and thus payments actually made for maintenance and cure in no way affected the amount to which the appellee was entitled in his suit under the Jones Act.

In other words, the maintenance and cure claim had been disposed of because appellee had no medical expenses and his maintenance had been paid as provided in the collective bargaining agreement; the claim asserted in this action under the Jones Act was for wages, in a sum not to exceed $831, and for compensation for his pain and suffering; the amounts paid pursuant to the terms of the collective bargaining agreement were quite irrelevant to the claim for wages or that based on pain and suffering; and the trial judge properly and wisely refused to take evidence of these payments and instructed the jury to confine themselves on the subject of damages to lost wages and pain and suffering. With all deference to my brothers I think a basic error in their reasoning is the connection they see between appellee's claim for lost wages and the maintenance payments made pursuant to the terms of the collective bargaining agreement. In my view the two bear

no relation whatever one to the other. And I think that to the extent that *Guay* v. *American President Lines, Ltd.*, 81 Cal. App. 2d 495, 184 P. 2d 539, expresses views to the contrary it states bad law and should not be followed. The step now taken by my brothers can only lead to delayed payments, confusion and uncertainty in a phase of the law of seamen's rights that should be as simple and clear as possible.

Nor do I find any difficulty with our Per Curiam in *Perez* v. *Swanee Steamship Co.*, 2 Cir., 239 F. 2d 180, which is quite consistent, I think, with the views above expressed. In *Perez* the general damage claim was dismissed on the merits, leaving only the claim for maintenance and cure. The trial judge fixed the maintenance to include the entire period of the seaman's "convalescence," despite the fact that he had been gainfully employed during part of that time. In deducting the amount of the earnings from the award we did no more than reaffirm the well settled principle that the purpose of maintenance and cure is to make the seaman whole, "to put the seaman in as good a position as to board and lodging as he would have been in, if he had not become ill". And we added: "If what he earned is added to the full allowance, he will get something more in addition to his maintenance." This is a very different thing from saying that the claim for wages in a Jones Act case is to be diminished by payments made for maintenance and cure.

Similarly, Section 5 of the FELA does not entitle the appellant to set off any portion of the amount paid for maintenance and cure against the verdict recovered below because the jury was specifically instructed not to include an amount for board and lodging in its verdict. In other words, Section 5 prohibits double recovery just as does the case law on this subject and the appellee in the case at bar has not received such excessive compensation.

I would affirm the judgment appealed from.

(Opinion on Petition for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 53—October Term, 1957

(Petition filed April 22, 1958 · Decided November 6, 1958)

Docket No. 24583

ALBERT REARDON,

Plaintiff-Appellee,

—v.—

CALIFORNIA TANKER COMPANY,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and

HINCKS, LUMBARD, WATERMAN and MOORE, *Circuit Judges.*

On Petition for Rehearing

HARRY RUBERMAN, JOHN GLEASON, HARVEY GOLDSTEIN, JOHN ROBINSON, LOUIS R. HAROLDS, and STANDARD, WEISBERG, HAROLDS & MALAMENT, New York City, *for plaintiff-appellee.*

C. DICKERMAN WILLIAMS and ROBERT M. MAKLA, of Maclay, Morgan & Williams, New York City, *for defendant-appellant.*

PER CURIAM:

A majority of the judges in active service having voted pursuant to 28 U. S. C. § 46(c) for a determination *in banc* of the plaintiff's petition for a rehearing of the judgment of reversal entered herein on April 7, 1958, the determination will be so made. Plaintiff, a seaman, suing under the Jones Act, 46 U. S. C. § 688, had recovered a verdict and judgment of $1,600 for damages for personal injuries, which the panel previously sitting reversed for a new trial, with an opinion written by Judge Swan, concurred in by Judge Waterman, and with a dissenting opinion by Judge Medina. Judges Swan and Medina have not participated in the present decision. A majority of the judges participating concur in the views expressed by Judge Medina in his dissenting opinion. Accordingly the previous judgment of reversal is withdrawn, and the judgment below is affirmed.

The previous ruling was based on a finding of error on the part of the trial judge in holding inadmissible evidence offered by the defendant to prove that it, pursuant to its collective bargaining agreement with the union, had paid plaintiff for maintenance and cure for the 72-day period of convalescence, at the rate of $8 per day, a total of $576. No issue of allowance for maintenance and cure was before the jury, and the judge specifically charged that the jury should not consider the cost of room and board during convalescence. Our previous majority held that if the $756 exceeded plaintiff's actual expenses for maintenance, the defendant should have been allowed to deduct the excess from the alleged damage item of lost wages to avoid "double compensation," and hence that evidence bearing upon this issue should have been admitted. But we agree with Judge Medina that the amount of $8 per day for this item fixed in the collective bargaining agreement was a fair and proper pre-estimate which neither party could repudiate. Hence the defendant could not be heard to say that when it paid plaintiff the agreed-upon amount it had overpaid him.

The parties have presented arguments on the issue whether in this class of cases a claim for maintenance and cure should or should not be heard by the jury along with the Jones Act claim—an issue much mooted by text writers and in other circuits. But as we have just indicated, the issue before us is not one of an affirmative award for that purpose, only of a deduction or refund on a jury award. We may add, however, that we see no reason to depart from our previous rulings in effect holding the form of trial in the discretion of the trial court so long as care is taken to see that double compensation is not allowed. *Gonzales v. United Fruit Co.*, 2 Cir., 193 F. 2d 479, 480, n. 1; *Weiss v. Central R. Co. of N. J.*, 2 Cir., 235 F. 2d 309, 310, n. 1.

Judgment of the district court affirmed.

MOORE, *Circuit Judge*, concurs in the result.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result. So soon after *Perez v. Swanee S. S. Co.*, 239 F. 2d 180, 181 (2 Cir., 1956), an *in banc* affirmance of the district court's exclusionary ruling should be by a unanimous court. Hence, though I was of the majority that held otherwise in our former decision, I now join with the other active circuit judges of the circuit in such an affirmance. My only excuse for writing any separate remarks is that I do not wish the result reached here to be interpreted as meaning more than the individual facts of this case justify.

Reardon based his libel upon the Jones Act. He alleged that he was injured in the course of his employment due solely to the shipowner's negligence and that by reason thereof the vessel upon which he was employed was unseaworthy. He did not particularize the damages he sought

to recover, but they were properly limited to compensation for loss of money wages any incapacity resulting from his injury prevented him from earning, and for his pain and suffering.

In his libel Reardon significantly did not include a count praying for an allowance for maintenance and cure. He appears to have been well satisfied in that particular; and he has successfully prevented his employer from disclosing any facts relative thereto. His employer sought to prove that pursuant to a collective bargaining agreement it had paid him and he had received $8.00 a day for 72 days as such an allowance in lieu of receiving actual maintenance, and that the total sum so paid exceeded Reardon's actual maintenance expenses. Its purpose was to have this excess money payment credited against the money damages Reardon sought to recover for his loss of money wages.

Reardon sought no adjudication by the district court respecting the sufficiency of the $8.00 a day allowance, or the adequacy of the 72-day duration of these $8.00 daily payments. The district court held that these maintenance payments had no application to damage claims asserted under the Jones Act, the claims that Reardon did present to it for adjudication. It held that inasmuch as the libelant had not sought any allowance for maintenance and cure from the court, the respondent could not show any over-allowance it may have made out of court therefor.

Lest we create further confusion, we should not attempt to ascribe further reasons to support our affirmance than those the court below acted upon. Where the seaman has included a prayer in his libel for the granting of an allowance for maintenance and cure we have permitted shipowners to put in defenses looking toward reductions of the amounts claimed. *Perez* v. *Suncance S. S. Co.*, *supra*; *Wilson* v. *U. S.*, 229 F. 2d 277 (2 Cir. 1956), where Judge Frank said of the nature of the claim for allowance for maintenance and cure, "it is sufficiently 'contractual' so that the seaman has the equivalent of the so-called 'duty'

to mitigate damages." *Supra* at 281. And when the seaman has expended nothing for the maintenance he seeks the court to allow him, shipowners heretofore have been permitted to show it, thereby preventing the seaman from recovering anything. *Johnson* v. *U. S.*, 333 U. S. 46, 50, 68 S. Ct. 391 (1948); *Field* v. *Waterman S. S. Corp.*, 104 F. 2d 849 (5 Cir. 1939); *Stankiewicz* v. *United Fruit S. S. Corp.*, 229 F. 2d 580, 581 (2 Cir. 1956); *Williams* v. *U. S.* 228 F. 2d 129, 134, *cert. den.*, 351 U. S. 986; *The Bay Mead*, 88 F. 2d 144 (9 Cir. 1937). By our present decision I would not wish it understood that the decisions I mention are no longer applicable in this circuit.

Moreover, carefully guarded as the mention of it is, I regret the mention in the court's opinion of the varied ways that district judges presently handle claims for maintenance and cure when such claims are coupled in the same libel with Jones Act claims. There was no coupling here.